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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIC M. et al., Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.	G053924 (Super. Ct. No. 16DP0155) O P I N I O N

Original proceedings; petitions for extraordinary writ to challenge an order of the Superior Court of Orange County, Craig E. Arthur, Judge. Petitions denied.

Juvenile Defenders and Vincent Uberti for Petitioner Eric M.

Sharon Petrosino, Public Defender, Laura Jose, Assistant Public Defender, Robert B. Waltman and Dennis M. Nolan, Deputy Public Defenders, for Petitioner H.B.

No appearance for Respondent.

Leon J. Page, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Offices of Harold LaFlamme and Linda O'Neil, for Real Party in Interest Jackson B.

* * *

INTRODUCTION

Jackson B.'s parents – his mother, H.B., and his father, Eric M. – have filed writ petitions regarding juvenile court orders bypassing reunification services for both of them. Jackson came under the jurisdiction of the court, which vested custody in Orange County Social Services Agency (SSA), after he suffered severe burns at Eric's hands. H.B. delayed three days before getting medical assistance for Jackson, three days in which the damage from the burns became more and more pronounced as the outer layers of his skin died and open sores appeared. When Jackson finally reached the hospital, he was immediately placed on morphine.

We affirm both orders. Welfare and institutions Code section 361.5, subdivision (b), permits a court to bypass reunification services when parents have subjected a child to severe physical harm.[1] Jackson's physical suffering was clearly profound, and we can only hope he escapes permanent emotional scarring.

H.B. has also appealed from the denial of her request for visitation. The trial court has broad discretion to grant or deny visitation, and we cannot say that discretion was abused in this case. We affirm the order denying visitation to H.B.

FACTS

Jackson was four months old on February 2, 2016, and living with H.B., Eric, and Eric's parents in a motel when Eric decided to bathe him in the bathroom sink.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Eric put Jackson in the sink and turned on the hot water.[2] Jackson began screaming, and Eric pulled him out.[3] Jackson's skin had turned red. The adults debated what to do about Jackson, and in the subsequent interviews with SSA and law enforcement and in trial testimony, each blamed someone else for not seeking immediate medical attention for the child. Eric's parents said they told H.B. and Eric to take Jackson to the hospital, but they refused. Eric said he tried to convince H.B. to take Jackson to the hospital, but she refused because she thought she and Eric would get in trouble. H.B. claimed Eric's mother told her Jackson did not need medical attention – aloe vera would fix him up. H.B. also testified she was afraid to tell Eric the baby needed to go to the hospital. H.B.'s and Eric's reluctance to take action for the baby was perhaps influenced by the fact they had been taking drugs on the day Jackson was injured and by Eric's fear that his parole would be revoked if he showed up at a hospital with a burned baby.[4]

Jackson's condition deteriorated over the next two days, and H.B. finally made an appointment for him with a pediatrician for the next day.[5] She was continuously under the influence of drugs during that time, when she was not sleeping. Three days after being burned, Jackson finally saw a doctor, who told H.B. to take him to the hospital immediately. He was eventually admitted to the UCI burn center on February 5, 2016,[6] with first- and second-degree burns over his chest, abdomen, inner thighs, buttocks, and left arm, and given morphine. At the time he was admitted to UCI, Jackson's skin was peeling off, and he had open sores on his abdominal and genital area and on his buttocks. The medical staff informed one of the police officers investigating the case that the dead

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[2] A police officer later tested the hot water faucet and found that the water temperature reached 150° after 2 seconds.

[3] How long Eric held Jackson under the hot water was not determined. Eric stated, "30 seconds. No more than a minute." H.B. estimated 15 seconds. However long it was, it was long enough to inflict second-degree burns.

[4] At the time of the incident with Jackson, H.B., age 21, had been arrested five times and Eric, age 23, had been arrested over 20 times.

[5] Both Eric and H.B. acknowledged that Jackson had been screaming the day after being burned.

[6] Eric was at a party with his girlfriend (not H.B.) when Jackson was admitted to the hospital.

skin would have to be scraped off, and Jackson would need "several years" of surgery to restore his skin. Jackson went into medical foster care on February 10, but his wounds still became infected.

Eric and H.B. were arrested for child abuse and later pleaded guilty. On March 4, H.B. was sentenced under Penal Code section 273a, subdivision (a), to probation with 270 days in custody and a restraining order. Eric was sentenced to 2 years and a restraining order. The restraining orders prevented any contact between parent and child for 4 years.

At the detention hearing (held before their plea in the criminal case), both H.B. and Eric invoked their Fifth Amendment rights not to be questioned about the incident by SSA. The court ordered SSA to provide reunification services and, in light of Jackson's fragile health condition, denied in-custody visitation.

The jurisdiction hearing took place on April 4, 2016. Both parents pleaded no contest to an amended petition. H.B.'s counsel raised the issue of visitation for her, but the matter was tabled because she was still in custody. The issue came up again in June after H.B.'s release from jail, at a hearing that had to be continued because Eric had not been transported from prison.[7] The court stated it would postpone any decision regarding visitation for H.B. until after the disposition hearing.

The disposition hearing concluded on August 16, 2016. At the time of the hearing, H.B. was pregnant again, with Eric's child, due in two months. SSA recommended that reunification services be bypassed, in light of the infliction of severe physical harm on Jackson.

The juvenile court declared Jackson a dependent of the Orange County Superior Court. It bypassed reunification services for both parents. Services were bypassed for H.B. under section 361.5, subdivision (b)(6) (severe physical harm) and for

[7] The disposition hearing was continued twice to allow Eric to be present. In July, Eric filed a document stating that he did not want to be present at the hearing.

Eric under section 361.5, subdivisions (b)(6) and (e)(1) (severe physical harm and incarcerated parent). While the initial burning was probably unintended, their subsequent failure to seek medical attention for Jackson was not. Both Eric and H.B. allowed their own concerns – Eric with his parole and H.B. with continuing her drug use and maintaining her relationship with Eric[8] – to override concern for Jackson's well-being. As a result, Jackson suffered needlessly for three days until H.B. finally got around to seeking help for him. H.B. also admitted in court that her drug use – consistent over the three days between Jackson's injury and his treatment – contributed to the delay.

The court denied visitation to both H.B. and Eric. The court set a hearing under section 366.26 for December 12, 2016.

DISCUSSION

Eric and H.B. have both filed writ petitions with respect to the order bypassing reunification services. We review it for substantial evidence. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 839.) H.B. also argues that the court should have granted her visitation. "We review an order setting visitation terms for abuse of discretion. [Citations.] We will not disturb the order unless the trial court made an arbitrary, capricious, or patently absurd determination. [Citation.]" (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.)

I. H.B.'s Arguments

A. Reunification Services

H.B. makes two arguments regarding reunification services in her petition. First, she asserts that the juvenile court could properly bypass them only if she hurt Jackson deliberately, not negligently. She also asserts the court erred in bypassing services for her because allowing them would serve Jackson's best interests.

[8] H.B. had another child, Michael, born in 2014. She testified that Eric, who was not Michael's father, abused Michael and threatened to kill him. Rather than sever her relationship with Eric, H.B. gave Michael up for adoption at the age of 10 months.

Section 361.5 lists the conditions under which reunification services can be bypassed. "These comparatively extreme situations '"reflect[] the Legislature's desire to provide services to parents only where those services will facilitate the return of children to parental custody." [Citations.] When the court determines a bypass provision applies, the general rule favoring reunification is replaced with a legislative presumption that reunification services would be '"an unwise use of governmental resources."' [Citation.]" (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1074.)

Section 361.5 provides in pertinent part: "(b) Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of . . . the infliction of severe physical harm to the child . . . by a parent . . ., and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent . . . . [¶] . . . [¶] A finding of the infliction of severe physical harm, for the purposes of this subdivision, may be based on, but is not limited to, deliberate and serious injury inflicted to or on a child's body . . . by an act or omission of the parent . . . or any other torturous act or omission that would be reasonably understood to cause serious emotional damage. [¶] . . . [¶] (i) In determining whether reunification services will benefit the child pursuant to paragraph (6) . . . of subdivision (b), the court shall consider any information it deems relevant, including the following factors: [¶] (1) The specific act or omission comprising . . . the severe physical harm inflicted on the child . . . [¶] (2) The circumstances under which the abuse or harm was inflicted on the child . . . [¶] (3) The severity of the emotional trauma suffered by the child . . . [¶] (4) Any history of abuse of other children by the offending parent . . . [¶] (5) The likelihood that the child may be safely returned to the care of the offending parent . . . within 12 months with no continuing supervision . . . ." Section 361.5, subdivision (c), provides, in pertinent part, "The court shall not order reunification services for a parent . . . described in paragraph . . . (6) . . . of

subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

H.B. argues on appeal that reunification services can be bypassed under section 361.5, subdivision (b)(6), only if she deliberately harmed Jackson. The statutory language clearly states otherwise. A finding of severe physical harm is not restricted to deliberate injury. It "may be based" on deliberate and serious injury, but is not so limited.

H.B. relies on *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839 (*Tyrone W.*), which held that the Legislature did not intend section 361.5, subdivision (b)(6), to apply to a merely negligent parent. (*Id.* at p. 843.) What *Tyrone W.* actually held was "[T]he statutory language in section 361.5, subdivision (b)(6) . . . does not authorize the court to deny reunification services to a negligent parent, *that is, a parent who did not know the child was being physically abused or injured* (*although the parent should have reasonably known of the abuse or injury.*)" (Italics added.) (*Tyrone W., supra,* 151 Cal.App.4th at p. 848.)

There was no "did-not-know" or "should-have-known" about Jackson's injury. H.B. was thoroughly aware that Jackson had been burned. She was there when it happened. She watched his burns get worse and worse over three days, while she continued to abuse methamphetamines, before she did anything about them. This conduct goes well beyond should-have-known negligence.

H.B. pleaded guilty to a crime under Penal Code section 273a, subdivision (a), which provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or

her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

The abuse covered by this statute "can occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect. Two threshold considerations, however, govern all types of conduct prohibited by this law: first, the conduct must be willful; second, it must be committed 'under circumstances or conditions likely to produce great bodily harm or death.' [Citation.]" (*People v. Smith* (1984) 35 Cal.3d 798, 806.) "'Willful' does not require a specific intent to violate the law or to injure another. Rather, it requires a purpose or willingness to commit the act or make the omission. [Citations.] The degree of culpability required by the statute has been determined to require 'criminal negligence in the commission of an offending act.' [Citations.] Criminal negligence 'means that the defendant's conduct must amount to a reckless, gross or culpable departure from the ordinary standard of due care; it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life.' [Citation.]" (*People v. Odom* (1991) 226 Cal.App.3d 1028, 1032; see *People v. Deskin* (1992) 10 Cal.App.4th 1397, 1402.) Having pled guilty to an offense requiring proof of criminal negligence, H.B. is hard put to argue here that section 361.5, subdivision (b)(6), does not apply to her conduct.

H.B. also acknowledges that reunification services can be denied on the basis of omissions, when a parent fails to obtain medical help for an injured child. (See *Pablo S. v. Superior Court* (2002) 98 Cal.App.4th 292, 301 [parents ignored child's broken leg for two months].) She argues, however, that "it was not apparent to H.B. that her child required morphine to manage his pain." Whether or not he required morphine, he was obviously in pain and in need of professional medical care.

Having made the necessary finding of severe physical injury under section 361.5, subdivision (b)(6), a court *cannot* order reunification services unless there is *clear and convincing evidence* that reunification is in the child's best interest. (§ 361.5, subd. (c); see *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157-1158.) None of the applicable considerations outlined in section 361.5, subdivision (c), clearly and convincingly favors reunification with H.B. The harm and its circumstances were both horrifying. H.B. sat in a motel room for three days doing drugs or sleeping while her child screamed at least with every wet diaper. The juvenile court found – and we agree – that Jackson must have suffered severe emotional trauma in addition to his physical pain, while his distress was ignored. It is highly unlikely that Jackson could have been safely returned to H.B. within 12 months with no supervision, in light of H.B.'s continuing relationship with Eric and the severity of her drug problem.[9] H.B.'s continuing involvement with Eric, whom she professed to fear and whom she accused of abuse, would of itself support the juvenile court's conclusion that reunification was not in Jackson's best interests. A victim of domestic violence as H.B. claimed to be, however pathetic her plight, does not get a pass when it comes to severe physical injury to a child for whom she is responsible.

B. Visitation

H.B. first asked for visitation at the detention hearing, while she was in jail. The court declined to order it, citing Jackson's vulnerability to infections as a result of the damage to his skin caused by untreated burns. H.B. got out of jail on June 19, 2016. A criminal restraining order was, however, still in force.

H.B.'s attorney asked for visitation twice as the disposition hearing was being continued.[10] At the conclusion of the hearing, in August 2016, the court denied any visitation for H.B.

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[9] Although H.B. claimed at the disposition hearing that she had been sober for about six months, she had cleaned up before, only to relapse.

[10] Counsel asked for monitored visitation on June 22, and July 19. The disposition hearing began on August 3, 2016. Counsel asked to revisit the issue again on the day before the conclusion of the disposition hearing.

The court has broad discretion in fashioning visitation orders, and we review the court's determination for a clear abuse of discretion. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) "[V]isitation is not integral to the overall plan [of reunification] when the parent is not participating in reunification efforts." (*In re J.N.* (2006) 138 Cal.App.4th 450, 458-459.)

We cannot say the court abused its discretion in this case by denying visitation. The criminal court had already issued a restraining order against H.B. as part of her sentence for child endangerment. Granting the request for visitation would require a subsequent order modifying the restraining order. By the time H.B. got out of jail, Jackson had already been out of her care for half his life; by the time the disposition hearing ended, he had been in foster care for two more months and was still struggling with stranger anxiety as well as his physical injuries. The court could have no way of knowing how Jackson would react to seeing her again after his traumatic experience with her, and we cannot say it abused its discretion by denying H.B. visitation.

II. Eric's Arguments

Eric too argues that reunification services could be denied only if he deliberately hurt Jackson. He also argues in favor of H.B.'s receiving services, observing that if she gets them, he should get them too. If H.B. completes her reunification services, her parental rights will not be terminated, and then his cannot be terminated either. So it would be better if he had services.

We have already disposed of the argument that reunification services can be denied only in cases of deliberate injury. Eric's conduct was, if anything, even more callous than H.B.'s. He was more concerned with his parole than with his son's injury, an injury he had inflicted. He took no steps whatsoever to get help for Jackson – not even to make a belated appointment with a pediatrician. He left H.B. to cope with everything, even though he claimed she was a terrible mother. When his son was admitted to the hospital with second-degree burns, he was at a party in Corona with his

girlfriend and could not manage to get a ride to the hospital. Even if the initial burning was accidental, Eric definitely falls under the "omission" portion of section 361.5, subdivision (b)(6).

We have also dealt with the arguments Eric advances regarding H.B.'s eligibility for reunification services, which mirror H.B.'s arguments. The only argument he makes in addition to the ones H.B. included in her petition was a contention that the court had no evidence of emotional trauma, specifically expert testimony "that prolonged pain at a young age leads to emotional trauma." According to Eric, if physical pain causes emotional trauma, "then every time a child gets hurt or experiences pain, the parents are guilty of emotionally traumatizing the child, through either act or omission." The absurdity of this statement is apparent. In the first place, a parent does not always cause a child's injuries, as Eric did in this case, so a parent could not emotionally traumatize a child every time he or she is injured. More importantly, however, Jackson did not just scrape his knee or fall off the jungle gym. He was left to suffer for three days while the adults who were responsible for his well-being went about their lives. It does not take expert testimony to infer that three days of intense physical pain can have a deleterious psychological effect on a helpless infant. (See Evid. Code, § 801, subd. (a) [expert testimony limited to "subject that is sufficiently beyond common experience"].)

As we are upholding the juvenile court's denial of reunification services to H.B., we need not address Eric's argument that he should also receive them.

DISPOSITION

H.B.'s and Eric's petitions for extraordinary relief are denied on the merits. The temporary stay of the section 366.26 hearing is lifted, and this case is remanded to the juvenile court for a section 366.26 hearing.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.